

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 25, 2009

STATE OF TENNESSEE v. LAMAR A. FRANKLIN

**Appeal from the Criminal Court for Hamilton County
No. 264031 Don W. Poole, Judge**

No. E2008-02384-CCA-R3-CD - Filed March 26, 2009

The defendant, Lamar A. Franklin, pleaded guilty to one count of civil rights intimidation and one count of robbery, and the Hamilton County Criminal Court ordered him to serve four years' incarceration for the robbery conviction concurrently with two years' incarceration for the civil rights intimidation conviction. The defendant appeals his sentences, arguing that the trial court erred in enhancing his sentence for the robbery conviction to four years' incarceration and that the trial court erred in not granting alternative sentencing. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE, J., joined. JOSEPH M. TIPTON, P.J., concurring in the result.

Ardena J. Garth, District Public Defender (on appeal and at trial); and Richard Kenneth Mabee, Assistant District Public Defender (on appeal), for the appellant, Lamar A. Franklin.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William H. Cox, District Attorney General; and Neil Pinkston, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On May 23, 2007, a Hamilton County grand jury indicted the defendant for one count of civil rights intimidation, *see* T.C.A. § 39-17-309 (2006), and one count of aggravated robbery, *see id.* § 39-13-402, of the victim, Elisama Berdoo-Gomez¹ on March 21, 2007. On April 8, 2008, the defendant pleaded guilty to civil rights intimidation and simple robbery, *see id.* § 39-13-401. After holding a sentencing hearing, the trial court ordered the defendant to serve four years' incarceration for the robbery conviction concurrently with two years' incarceration for the civil

¹The record also lists the victim's surname as "Gomez-Berduo"; however, it is the practice of this court to use the spelling from the indictment.

rights intimidation conviction with standard release eligibility of 30 percent. The trial court entered the judgments of conviction on July 7, 2008, and the defendant filed a timely notice of appeal on August 5, 2008.

In the sentencing hearing, Detective Dale Taylor of the Chattanooga Police Department testified that on March 21, 2007, he received a call reporting a home invasion at 1416 East Fifth Street. He located the victim at her apartment, where she “was home with some small children at the time.” Because Detective Taylor did not speak Spanish, he requested a translator from the department. Detective Taylor started “canvassing the area” for suspects while waiting for the translator to arrive.

Detective Taylor recalled, “Just before my arrival on the scene, there had also come a call from 1409 Ivy Street where Anna Daniels had called advising that a black male . . . had asked her to hold some money.” He testified that, within 100 yards of the victim’s residence, he noticed a black shirt on the ground “that [was] rolled up and there [was] noticeably something in it.” He found “a large red piggy bank full of loose change [amounting to \$91.85]” inside the shirt. He said, “I brought [the victim] back with me to see her facial expression at the sight of the piggy bank and it was very clear from her facial expression and behavior that she was identifying the piggy bank as hers.”

Detective Taylor explained that, while canvassing the area, he looked into garbage cans for any “evidence that may have been dropped along the way by any of the suspects.” He testified that the garbage cans were all recently emptied; however, the garbage can next to where he found the shirt and bank “did not move in any way, shape, form or fashion” when he “nuded” it. He said, “When I lifted the lid, I found [the defendant] hiding inside the garbage can.” At that point, the officer arrested the defendant.

The translator then arrived at the scene and interviewed the victim. The victim stated that two people approached her and robbed her. Detective Taylor noted that the victim mentioned the use of a knife in the robbery; however, he was “unable to recover any kind of a knife.” He asked the defendant about the knife, and “he denied any kind of weapon.”

The defendant received *Miranda* warnings and agreed to speak with Detective Taylor. The defendant told him that he “was walking down Fifth Street and that he did in fact see the victim outside in her yard.” Detective Taylor testified that the defendant said he was with another male whom he could only identify as “Dee.” Detective Taylor said, “[The defendant] was having some issues that day over financial trouble at home, momma was having trouble paying the bills and that Dee had suggested a way to make some money.” The defendant admitted to Detective Taylor that he had taken the “piggy bank.” The defendant explained to Detective Taylor, “[T]hey had watched [the victim] in the yard and when she went back in the house, they went to the door and knocked on the door.” Detective Taylor explained that “[the defendant] said that [the victim] said something in Spanish from inside at which time [either the defendant or “Dee”] replied Hola at which time when [the victim] opened the door, they entered the house.” The defendant told Detective Taylor that the victim was chosen because she was a Hispanic female and no males were visible at her residence. Detective Taylor noted that a particularly large number of Hispanics are robbed in certain areas of

the city; however, he noted that the victim did not live in those targeted areas. Detective Taylor could not recall whether the defendant expressed any remorse for the incident. Further, he agreed that the defendant “denied ever doing something like this before but did admit to robbery of a crack head some two years ago.”

On cross-examination, Detective Taylor stated that none of the victim’s children were harmed during the robbery. He stated that, after discovering the defendant in the garbage can, he “seemed perfectly as normal as you or I are right now.” He agreed that the defendant was cooperative with the investigation.

James Rox of the Tennessee Board of Probation and Parole testified that he prepared and submitted the presentence investigation report. Mr. Rox noted that the defendant had “two convictions from Hamilton County Sessions Court, one was a domestic violence conviction on July 5, 2006, [and] the other was a violation of driver’s licence law on May 9, 2006.” He also noted that the defendant had “a couple of juvenile charges,” but the charges had been dismissed.

Mr. Rox testified that he never received a victim impact statement as part of his investigation and that the defendant chose to not give a statement. He found no history indicating the defendant’s involvement in gang activity. Mr. Rox said the defendant had dropped out of high school during the ninth grade, and he had not completed or passed a general education development (GED) test. He testified that the defendant had enrolled with Optimum Staffing, a staffing agency, and the agency informed Mr. Rox that, although the defendant did not receive much work, “when they did call him, he would show up and do a good job.” Mr. Rox said, “Basically [the defendant] was unemployed at the time.” Mr. Rox stated that on March 19, 2007, the defendant went to the Fortwood Center for a mental health intake evaluation, and he said, “They recommended he come back but he never did any follow up on that.” The presentence report reflected that Fortwood diagnosed the defendant with “mood disorder, . . . bipolar disorder, . . . polysubstance dependence, . . . and [attention-deficit/hyperactivity disorder].”

On cross-examination, Mr. Rox noted the defendant had no prior felony convictions. He also stated that the defendant’s evaluation at Fortwood occurred “about three days prior to this incident.” Mr. Rox also stated that the defendant mentioned that he was worried about paying his electric bill at the time of the crimes.

The defendant testified that he “was at home and [his] momma was talking about some bills she needed to have paid.” He explained, “[T]he lights was fixing to get turned off.” He said, “So I left and went over [to] my friend’s house, me and my friend was talking and a dude named Dee he come up the street every now and then.” He testified that Dee was “talking about these little Mexicans up the street. He said they be having a lot of money on them whatever.” The defendant said “naw” at first, but he eventually decided to accompany Dee. He testified,

The lady came outside and she went back in. [Dee] said she looked like she was by herself so we went up there and knocked on the door. [Dee] said Hola, she opened the door. I just grabbed her, we didn’t have no weapon at all, I just grabbed her. [Dee] started going through

the place and he start talking crazy. So I went back there with them and I just grabbed the piggy bank and ran out the door.

The defendant testified that he lived with his mother, nine sisters, and his niece and that he helped support them. He explained that he previously had moved out of the house and into his aunt's house because he and his mother "just wasn't getting along"; however, he moved back into his mother's house because "[he] and [his] auntie was having a little problem." On cross-examination, he admitted that his moving from his aunt's home resulted from a domestic assault committed against her for which he was convicted. He further explained that his suspended sentence from the domestic assault had been revoked as a result of his current charges.

The defendant testified that he "was locked up for seven months" because he "had violated an eleven twenty-nine probation that [he] thought was over with." After being released from jail, the defendant worked with a staffing service "packing stuff and shipping them out on trucks." He testified that, at the time of the robbery, he "was working at little factories off and on" and making about seven dollars an hour.

The defendant testified that Fortwood told him "to go to little drug classes," but he "didn't want to go to no drug classes" so "[he] didn't go back." He explained, "I just feel like drugs wasn't a problem for me." He testified that he used marijuana to cope with his depression and that he understood he should use legal drugs for this purpose instead of illegal drugs. He stated that he once took money from a "crack head." He said, "I just took it because, yeah, I wanted some marijuana."

On cross-examination, the defendant stated that he had last purchased and smoked marijuana five days before the hearing. He bought approximately five dollars worth of marijuana. He estimated that he smoked marijuana every other day, and he had sought to purchase marijuana while his case was pending. He also maintained on cross-examination that his taking a "crack head's" money "wasn't no robbery." He said, "He just gave me his money, I just took it, it wasn't no robbery."

The defendant stated that he wished he had never committed the crimes, and he explained, "I know that wasn't me, I don't do stuff like that." When asked what he would do differently, he replied, "Just think about it first." He explained that he was "trying to . . . get back on [his] feet, finish school" and that he wanted to go to college and "just leave all this stuff behind . . . and start anew." He expressed that he wanted to participate in Job Corps and that he was willing to attend drug treatment.

At the close of proof, the trial court first noted that the defendant was a standard offender, and he faced between two and four years' incarceration for his civil rights intimidation conviction and between three and six years' incarceration for his robbery conviction. In considering both convictions, the court determined that the defendant's age was not a mitigating factor. Although the defendant was 21 years old, the trial court noted he had been "before courts at ages of 18 [and] 19." The trial court gave "very minimal" consideration to the defendant's claim to provide

for the necessities of his family as a mitigating factor. The trial court, however, considered as a mitigating factor that “[the defendant] has had a tough life up to this point.”

The trial court considered as enhancing factors the defendant’s criminal history and that the defendant was on probation at time of the offense. In terms of the robbery conviction, the court considered of “extreme importance” that “the defendant intentionally selected the person against whom the crime was committed . . . in whole or in part because of the actor’s belief or perception regarding race.”

The trial court considered alternative sentencing and opined “this is not an appropriate sentence for outright probation as a matter of actual fact.” The trial court noted the negative social history of the defendant and his continual use of illegal drugs without seeking treatment. The court “considered [the drug use] in regard to providing necessities because the proof seemed to be that he was continuing to use marijuana even though his family was in dire need of some help.” In considering the targeting of a Hispanic victim, the trial court realized that, according to the defendant’s testimony, Dee contributed to targeting her. The trial court stated, “I don’t think [the defendant] was a leader but I don’t think he was a follower.” The court also considered the defendant’s criminal history and noted, “I do find that he will not abide by the terms of probation because he hasn’t up to this point in time.”

The trial court did not consider the defendant “a dangerous individual under the law as far as confinement is concerned”; however, the court found confinement necessary as to not depreciate the seriousness of the offense. The trial court considered the robbery, due to its racial nature, offensive, and it stated, “[I]t is excessive, it’s exaggerated, it’s shocking when someone is picked out to be robbed because they are of a certain race of people.” The trial court determined that a Department of Correction sentence was necessary for general deterrence. The trial court ordered four years’ incarceration for the robbery conviction and two years’ incarceration for the civil rights intimidation convictions. The defendant appeals, claiming the robbery sentence is excessive and claiming the trial court erred in denying alternative sentencing.

I. Robbery Sentence

The defendant argues that the trial court failed to properly consider the defendant’s youth as a mitigating factor. *See* T.C.A. § 40-35-113(6). The defendant further argues that the trial court misapplied Tennessee Code Annotated section 40-35-114(17) because the evidence did not support the trial court’s determination that the robbery was racially targeted.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court’s determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *Id.* “The burden of showing that the sentence is improper is upon the appellant.” *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its

findings of fact are adequately supported by the record, this court must affirm the sentence, “even if we would have preferred a different result.” *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

A review of the sentencing hearing shows that the trial court, on the record, considered all mitigating and enhancing factors. *See* T.C.A. §§ 40-35-113, -114 (2006). As for the “youth” of the defendant, the presentence report showed that the defendant was nearly 20 years old at the time of the offense. When determining whether this mitigating factor applies, “‘courts should consider the concept of youth in context, i.e., the defendant’s age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant’s ability or inability to appreciate the nature of his conduct.’” *State v. Carter*, 908 S.W.2d 410, 413 (Tenn. Crim. App. 1995) (quoting *State v. Adams*, 864 S.W.2d 31, 33 (Tenn. 1993)). The record shows that the defendant had experience with the court system in juvenile and criminal court. The defendant was convicted of domestic assault in which he received, and subsequently violated, probation. The defendant’s own testimony, in which he stated, “I don’t do stuff like that,” showed his ability to discern the wrongfulness of his conduct. We find that the evidence supports the trial court’s decision to reject the defendant’s youth as a mitigating factor.

The trial court also applied Tennessee Code Annotated section 40-35-114(17) to enhance the defendant’s robbery sentence because he intentionally chose a Hispanic female as the victim.² The proof adduced at the evidentiary hearing supported the trial court’s decision to apply this enhancement factor. Detective Taylor noted that Hispanics had been targeted robbery victims in areas of the city. The defendant testified that he intended to solve his financial problems by accompanying Dee to rob “these little Mexicans up the street.” The court noted that, although the testimony suggested that Dee initially targeted “these Mexicans,” the defendant agreed to participate in a racially targeted crime, and it “[didn’t] think [the defendant] was a follower.” The defendant admitted to targeting the Hispanic female, and we cannot say the trial court acted outside its discretion in applying this enhancement factor.

II. Denial of Alternative Sentencing

The defendant next argues that “[t]he trial court erred in not granting alternative sentencing on the sentences for [r]obbery and [c]ivil [r]ights intimidation.” Once more, the thrust of the defendant’s argument is that the trial court placed too much importance on the finding “that the victim had been selected because she was Hispanic.” In the present case, as explained above, we review the trial court’s determination of the manner of service of the defendant’s sentences de novo with a presumption that the determination is correct. T.C.A. § 40-35-401(d); *see Ashby*, 823 S.W.2d at 169.

²Tennessee Code Annotated section 40-35-114(17) lists as an enhancement factor, “The defendant intentionally selected the person against whom the crime was committed . . . , in whole or in part, because of the defendant’s belief or perception regarding the race . . . , or gender of that person.” T.C.A. § 40-35-114(17).

As the recipient of Class C and Class D felony convictions, the defendant is considered a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). “[F]avorable status consideration,” however, does not equate to a presumption of such status. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Rather, sentencing issues are determined by the facts and circumstances presented in each case. *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). As the recipient of sentences of ten years or less, the defendant is also at least eligible for probation. See T.C.A. § 40-35-303(a). The defendant bore the burden of showing that he was entitled to probation. See, e.g., *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999) (holding that defendant bears the burden of establishing his “suitability for full probation”).

To determine the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) The presentence report;
- (3) The principles of sentencing and arguments as to sentencing alternatives;
- (4) The nature and characteristics of the criminal conduct involved;
- (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
- (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
- (7) Any statement the defendant wishes to make in the defendant’s own behalf about sentencing.

T.C.A. § 40-35-210(b). Additionally, “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative.” *Id.* § 40-35-103(5).

In the present case, the record reveals solid bases for ordering full confinement. Specifically,

Sentences involving confinement should be based on the following considerations:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary . . . to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1). Although the defendant’s criminal record is not extensive, the trial court was presented with ample evidence to find as a basis for confinement the importance of deterrence of

such racially charged crimes. Further, the trial court noted that the defendant had violated his probation on another case by committing the crimes of which he was convicted in this case. Because that the trial court considered all appropriate factor, and we will not disturb its denial of alternative sentencing and ordering of incarceration.

III. Conclusion

The trial court considered all relevant facts and law in making its determination of the length and manner of service of the defendant's sentences, and we affirm the judgments of the trial court.

JAMES CURWOOD WITT, JR., JUDGE